

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

UNITED STATES POSTAL SERVICE)

Respondent)

and)

LARRY PRETLOW)

An Individual)

Cases: 5-CA-180590

RESPONDENT’S OPPOSITION TO MOTION TO REMAND

Respondent, United States Postal Service (“Postal Service” or “Agency”), pursuant to Section 102.45 of the Board’s Rules and Regulations, hereby submits the instant opposition to Counsel for the General Counsel’s Motion to Remand the case back to Deputy Chief Judge Arthur Amchan.

The Judge’s Decision was clear and does not require clarification.

Counsel for the General Counsel’s motion is little more than an attempt to re-litigate the discrimination allegations that Judge Amchan dismissed. General Counsel raises the specter of an undecided issue. But that claim is without merit. The Judge’s decision leaves no room for such alleged doubt.

General Counsel claims that there were two discrete acts: the June 8, 2016 evaluation and the June 9, 2016 termination (based on the evaluation meeting). General Counsel alleges that the Judge ruled only on the termination and did not decide whether the evaluation was discriminatorily motivated. General Counsel further argues that but for the retaliatory

evaluation meeting, Mr. Pretlow would not have been in the position to be fired. With all due respect, General Counsel's position is nonsensical and suggests desperation.

The Judge's decision makes it abundantly clear that there was nothing improper about the evaluation or the termination. He decided both issues and had ample basis for doing so.

The Decision begins by recounting Mr. Pretlow's earlier employment and the undisputed fact, expressed in the Arbitrator's award that Pretlow would be returned to work in a probationary status. "[Arb. Braverman] also ordered that Pretlow would have to serve the remainder of the 90-day probationary period that is required for employees who are converted from CCA to regular status." The requirement to serve a probationary period was repeated in the initial discussion (*Id.* at 2) on several occasions. "She ordered that he would remain in probationary status until he completed the remainder of his 90-day probationary period." (JD-61-17 at 2 and 3). Further, the Judge noted that on Mr. Pretlow's first day back to work, May 4, 2016 "Khan informed Pretlow that his performance would be evaluated since he was a probationary employee. Khan and Pretlow initialed a blank evaluation form (Postal Service Form 1750)." (*Id.* at 3). Clearly, the issue of the evaluation was dealt with extensively by the Judge in the decision.

There was no question that the evaluation was proper due to Mr. Pretlow's return to duty in a probationary status – which required periodic evaluations. The Judge rejected General Counsel's claim that the evaluation was a "set-up." (*Id.* at 5). The Arbitrator's order of reinstatement in probationary status required Pretlow to be treated like any other probationary employee and thus be evaluated. The Judge's decision points out that Pretlow was informed of the evaluation requirement on his first day back, and "did not object" or assert discrimination at that time. (*Id.* at 6; also noting that Pretlow signed the PS Form 1750 - Evaluation form in blank upon his return to work). The Judge also pointed out that the

General Counsel's theory – that Respondent arranged an evaluation as a trap in the hope that Pretlow would act out in the meeting and therefore provide a basis for termination – was without merit. He concluded: "Moreover there is nothing in this record that would lead one to conclude that Respondent's managers should have anticipated that Pretlow's outburst in reaction to his performance evaluation." (*Id.* at 6). The Judge thereby concluded that the evaluation meeting itself could not have been intended as a set-up since no one could have predicted how Pretlow would behave.

The Judge pointed out the absence of any disparate treatment evidence related to the evaluation during the hearing itself. (Tr. 126). General Counsel initially alleged that other, similarly situated, employees had not been given evaluations in comparable circumstances. However, Respondent answered that allegation with explicit first-hand testimony that went un rebutted. The Judge then admonished Respondent to move on to deal with the evaluation meeting itself, rather than the background information leading up to the evaluation. "They actually haven't made a disparate treatment case." (Tr. 126)

The Judge's comment and his effort to point out the state of the hearing record up to that point were completely appropriate. There was no disparate treatment evidence at that time, and General Counsel offered nothing further subsequently. General Counsel's case was based almost entirely upon the timing of the termination, coming only 30 days after Pretlow was reinstated.

General Counsel also tried to invent an animus claim by charging that no other employees had such evaluations. General Counsel's theory was based on the assertion that there were three other employees who might have been comparable to Pretlow but were not given evaluations. However, that evidence was shown to be erroneous, prompting the Judge to negate the disparate treatment defense.

Mr. Khan, the Post Office manager, testified repeatedly that Mr. Pretlow's movement from one job category to another created a new situation (requiring a new series of evaluations) that had not yet happened with others. Khan explained that Pretlow first had the position of a CCA (City-Carrier Associate). That was a new position under the recent CBA. In that job, CCAs must be given regular evaluations during their 90-day probationary status. The CCA position is not a career position, but temporary in nature. If a CCA is converted to a regular career position (Regular Carrier) within two years of employment, then upon conversion to career status, the employee must undergo a new probationary status/evaluation period. (Tr. 31-33) Pretlow's employment as a CCA and his conversion to career status in February 2015 was discussed in the Arbitrator's award, and resulted in the order to return Pretlow in probationary status upon his reinstatement.

Because the CCA position was still relatively new, and no CCAs had yet been promoted or "converted" to career status, Mr. Khan did not yet have any employees who were in the position (like Pretlow) requiring a new probationary status. So there was no history of such conversions at the Engleside facility and no one similarly situated. There was no one in that category before Pretlow. (Tr. 133).

General Counsel offered a hearsay document that suggested that there may have been three other CCAs who were converted to career carrier, but had not been required to undergo new probationary status or new evaluations. Mr. Khan testified however that the document was wrong. The employees named in it were all still CCAs and none had yet been converted to career status and therefore none would have been subject to a new probationary period and evaluations. They were not like Pretlow at all, Khan testified. (Tr. 99-100; see also Tr. 134-136). This testimony was unrebutted. General Counsel ignored this evidence in the brief and in the motion for remand as well. It was at this point that the Judge pointed out that the

General Counsel had not actually put on disparate treatment evidence. (Tr. 126).

General Counsel makes much of the comment that Mr. Khan was initially not aware that he was supposed to conduct evaluations of career carriers who had been converted from CCA positions. His limited knowledge of the new process was completely irrelevant, however, since there were no other employees who should have received evaluations before Pretlow. Mr. Khan's lack of familiarity with a new evaluation requirement was not an excuse for failing to evaluate employees who were otherwise similar to Pretlow. There simply were no other employees who converted before Pretlow, and therefore there was no opportunity for comparable evaluations to take place earlier. Khan testified that he learned about the new evaluation procedure/requirement some few months before Pretlow was reinstated, and he informed Pretlow about the evaluation requirement on his first day back on the job.¹

There can be no legitimate doubt that the Judge rejected the general Counsel's contention that the evaluation itself was a product of discrimination. The Judge rejected each aspect of the allegation and stated on the record that there was no supporting evidence. The probationary status and evaluation were first dictated by the Arbitrator's award. The CBA also required such status. Pretlow was informed immediately upon his return that he would have to complete probation – including being evaluated. He did not challenge the requirement. The Judge then addressed General Counsel's allegation that Respondent created an evaluation meeting just for Pretlow, hoping Pretlow would act out and provide a rationale

¹ General Counsel makes much of the Judge's comment that Respondent might have provided more "specificity" about Khan's education about the new evaluation process. (JD-61-17 at 5). However, this is the same "background" evidence that the Judge repeatedly admonished Respondent was irrelevant to the case. Having demonstrated that there were no similarly situated employees who otherwise "should" have been evaluated, Respondent decided that the historical background of the evaluation process itself was not relevant (as the Judge urged). Mr. Khan's epiphany is a red-herring. It may seem interesting and even suspicious from General Counsel's perspective, but it is completely irrelevant. Respondent was not attempting to explain a suspicious lapse in failing to evaluate other similarly situated employees. Instead, Mr. Khan's first-hand account proved there were no other similar employees to evaluate. Pretlow was the first to convert from CCA to regular. Khan's new awareness of the new procedure thus is of no consequence at all, even if General Counsel finds the timing odd.

for termination. The Judge explicitly rejected this bizarre theory as well, noting more or less that Respondent's managers were not mind-readers and could not have predicted Pretlow's later behavior.

General Counsel's claim at the hearing and in the brief is no less absurd when repeated here. It appears to be a desperate attempt to find blame with Respondent for simply going about the normal business of evaluating the progress of probationary employees. In General Counsel's telling, Respondent should have known that Pretlow was a loose-cannon and that by attempting to meet with him at all, Respondent knew it was placing everyone at risk. Whether that is a fair characterization of Mr. Pretlow's earlier behavior and his predilection, the Judge rejected that theory outright. The decision does not require clarification; only reading.

Conclusion

For the foregoing reasons, Respondent United States Postal Service, respectfully requests that General Counsel's Motion for Remand be rejected.

Dated this 14th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Respondent's**
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